STATE OF MICHIGAN

IN THE SUPREME COURT

T.E.S. FILER CITY STATION LIMITED PARTNERSHIP,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, and ATTORNEY GENERAL BILL SCHUETTE,

Appellees.
_____/

Supreme Court No. 150395

Court of Appeals No. 305066

MPSC Case No. U-15675-R

MICHIGAN PUBLIC SERVICE COMMISSION'S AMENDED SUPPLEMENTAL BRIEF IN OPPOSITION TO TES FILER CITY STATION LIMITED PARTNERSHIP'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF ISSUE PRESENTED

By way of its order dated June 5, 2015, this Court directed the parties to file supplemental briefs on the following question:

> When the Michigan Department of Environmental Quality's administrative rules requiring generators to purchase NOx allowances were "implemented," as that term is used in MCL 460.6a(8).

INTRODUCTION

At issue in this case is whether Michigan implements its statutes and regulations on their effective date or, instead, on a rolling basis as various citizens feel their practical effect. The Michigan Public Service Commission (MPSC) argues that Michigan implements its statutory and regulatory schemes on their effective date.

Michigan jurisprudence is rife with statutes and rules that impose certain burdens and benefits on some citizens immediately and on other citizens later. The question of when Michigan "implemented" such a statutory or regulatory scheme should be a bright-line standard. And there should only be one answer: when a rule takes effect, it has been implemented.

But TES Filer wants this Court to instead treat the determination of when a statutory or regulatory scheme is implemented as an individual question, with a different answer for different citizens depending on when the statute or scheme has a practical effect on that citizen. Accordingly, TES Filer wants this Court to ask when the rule has a practical effect on TES Filer, and to hold that the MDEQ did not implement its regulatory scheme until it had a practical effect on TES Filer in 2009. This analysis is faulty.

The question of when Michigan implemented a statute or regulation an objective inquiry, one with a single answer for everyone, not dependent on who asks the question. Michigan implements a statutory or regulatory scheme based on its effective date. The State does not implement its statutes and rules on a rolling

basis as individual citizens feel their effects. This Court should reject TES Filer's argument and deny the application.

ARGUMENT

I. The administrative rules requiring generators to purchase NOx allowances were "implemented" on June 25, 2007.

This Court has asked when MDEQ's administrative rules requiring generators to purchase NOx allowances were "implemented," as that term is used in MCL 460.6a(8). The answer is on June 25, 2007.

A. The MDEQ implemented administrative rules requiring generators to purchase NOx allowances beginning May 20, 2004, and implemented changes extending those requirements to electric generating units like TES Filer on June 25, 2007.

Part 8 of the MDEQ Air Quality Division's Air Pollution Control rules "Emission Limitations and Prohibitions – Oxides of Nitrogen" became effective May 17, 2000. 1998-2000 Annual Admin Code Supp, R 336.1801. This early rule regulated NOx emissions from mainly fossil fuel-fired electric generators, and required those generators to reduce NOx emissions from 1990 levels by 55% by April 1, 2002, and by 65% by April 1, 2004. The MDEQ revised Part 8 in 2004, effective May 20, 2004 (the "2004 Rules"). 2004 Annual Admin Code Supp, R 336.1802, *et seq*. The 2004 Rules established the nitrogen budget trading program. 2004 Annual Admin Code Supp, R 336.1802 (1). The new budget trading program applied to units in the Michigan fine grid zone, and the unit at Detroit Edison Company's Harbor Beach facility in Huron County. *Id.* The MDEQ updated

the NOx budget trading program rules again in 2007, effective June 25, 2007 ("the 2007 Rules"). 2007 Annual Admin Code Supp R 336.1802a *et seq*.

New allowance rules applied immediately to electric generating units in the Michigan fine grid zone. 2007 Annual Admin Code Supp R 336.1803(3)(d)(ii)(A)-(B). Commencing May 1, 2009, the 2007 Rules required electric generating units outside the Michigan fine grid zone, like TES Filer, to participate in the NOx budget trading program. 2007 Annual Admin Code Supp R 336.1803(3)(j). For existing electric generating units, the 2007 Rules required MDEQ, by 60 days after the effective date of the rule, to submit allowance allocations to the U.S. Environmental Protection Agency for the electric generating units' annual control periods 2009, 2010 and 2011. 2007 Annual Admin Code Supp R 336.1830(2)(a).

The 2007 Rules had practical effect on various electric generating units immediately once effective. In fact, an electric generating unit, Midland Cogeneration, sued the MDEQ to enforce the 2007 Rules. *Midland Cogeneration Venture Ltd P'ship v Dep't of Envtl Quality*, unpublished opinion per curiam of the Michigan Court of Appeals issued July 8, 2008 (Docket No. 282716).[1] The Court of Appeals noted that "the DEQ established rules to enforce CAIR during the spring of 2007, with the rules becoming effective on June 25, 2007." *Id.*, slip op at 1.

[1] Attached as Appendix A. While unpublished, *Midland CoGeneration* is the only Michigan case applying the 2007 Rules.

B. The Legislature did not intend biomass plants to collect costs in excess of the cap incurred due to regulations existing at the time they passed the Act.

In order to determine what the Legislature intended by the term "implemented" as used in MCL 460.6a(8), it is necessary to recall the purpose of Public Act 286 (PA 286 or the Act). The Legislature intended the part of the Act that addresses merchant biomass plants to provide relief to plants locked into twenty-plus-year power supply contracts. MCL 460.6a(7) applies only to merchant plants that entered into contracts prior to January 1, 2008, with initial terms of twenty years or more to sell electricity to either DTE Electric or Consumers Energy,[2] and that generated electricity under the contract from wood or solid wood wastes. MCL 460.6a(7). These wood waste burning plants are commonly known as biomass plants.

Qualifying biomass plants may recover the amount by which their "reasonably and prudently incurred actual fuel and variable operations and maintenance costs exceed the amount that the merchant plant is paid under the contract for those costs." MCL 460.6a(7). The Act provides that these merchant plants, taken together, may recover up to $1 million per month from DTE Electric and Consumers Energy each. MCL 460.6a(8).

In setting the cap at $1,000,000 per month, the Michigan Legislature took into account the state of the law, and existing environmental regulations, at that

[2] The statute limits applicability to contracts with regulated Michigan utilities with one million or more customers, or in other words, DTE Electric and Consumers Energy.

time. The Legislature believed that $1,000,000 per month was sufficient compensation to give relief to biomass plants given the federal and environmental laws and regulations on the books. The Legislature knew that environmental protections are often subject to change and it could not know what state or federal requirements might arise in the future, and how these unknown regulations might affect biomass plant costs. Thus, the Act allowed one exception to the million-dollar cap – if the merchant plant had costs "incurred due to changes in federal or state environmental laws or regulations that are implemented" after October 6, 2008 (the effective date of the Act). *Id.*

If the Legislature had wanted to allow merchant plants to recover costs in excess of the cap incurred due to complying with environmental laws and regulations already on the books at the time they passed the Act, the Legislature would not have used the words "incurred due to *changes*":

> The $1,000,000.00 limit specified in this subsection, as adjusted, shall not apply with respect to actual fuel and variable operation and maintenance costs are *incurred due to changes* in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection. [MCL 460.6a(8) (emphasis added).]

Allowing merchant plants like TES to recover amounts in excess of the cap incurred due to compliance with rules on the books at the time the Legislature passed the Act would render the word "changes" nugatory. It is a well-established rule of statutory construction that courts "should take care to avoid a construction that renders any part of the statute surplusage or nugatory." *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002). "When parsing a statute, we

presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence." *Id.* at 683.

C. The MDEQ's 2007 Rules were implemented, as that term is used in MCL 460.6a(8), on the date they became effective.

This Court could read the § 460.6a(8) statutory phrase – "incurred due to changes in federal or state environmental laws or regulations that are implemented after" October 6, 2008 – in one of two ways. Under the first, a biomass plant is entitled to recoup its actual fuel and variable operation and maintenance costs if the *requirements* of the changes in the laws or regulations became applicable to the biomass plant after October 6, 2008. Alternatively, under the second reading, it could do so if the changes to the law or regulations were made after October 6, 2008. The question is whether "implement" means the time a new rule applies to a specific plant or when a new rule goes into effect. The latter is the proper understanding. The rule here took effect, i.e. was implemented, before October 6, 2008, but the requirements of that rule did not apply to TES Filer until after that date.

In two separate published opinions, the Court of Appeals found TES Filer did not incur costs due to changes in federal or state law implemented after October 6, 2008, because the MDEQ implemented its 2007 Rules on their effective date of June 25, 2007.

1. *TES Filer I.*

In the opinion in this case, referred to as *TES Filer I*, the Court of Appeals considered TES Filer's arguments and rejected them. The Court of Appeals held that a rule is "implemented" on its effective date. Judge Krause, writing with Judge Fitzgerald for the majority opinion, rejected TES Filers's argument that the 2007 Rules were not implemented until they had practical effect on TES Filer:

> We do not believe that any particular person or entity needs to feel the effect of a law or a rule for it to be "implemented." Rather, we conclude that the most principled way to determine when a rule or law has been "implemented" is to refer to the effective date thereof. [*In re Application of Consumers Energy Co. for Reconciliation of 2009 Costs*, 307 Mich App 32, 44; 859 NW2d 216 (2014).]

The majority responded to criticisms in the dissent that the majority confused promulgation of a statute with implementation:

> [W]e agree with our dissenting colleague that a rule is not *necessarily* "implemented" when it is "promulgated," because by statute, promulgation is merely the final procedural stage of processing a rule to the point of filing it with the secretary of state. Because "implement" is not defined by statute, we consider it to have its common dictionary meaning. As a verb, to "implement" means "to fulfill; carry out" or "to put into effect according to a definite plan or procedure." [*Id.* (internal citations omitted).]

The majority explained that Michigan implements a statute on its effective date, and said of the effective date: "It may be that this will often coincide with the date it is promulgated, but there is no reason why such contemporaneousness should be necessary. We therefore do not treat 'implement' and 'promulgate' as synonyms." *Id.*

The majority noted that the 2007 Rules were published in 2007 Michigan Register 12, on July 15, 2007, and stated that "'[t]hese rules were filed with Secretary of State on June 25, 2007' and that they would become effective immediately upon filing." *Id.* at 45. The majority concluded that because the 2007 Rules became effective immediately on July 25, 2007, "the rules were "implemented" in 2007." *Id.* at 45-46. The majority explained that "[t]he fact that TES Filer only became subject to those rules in 2009 does not affect when the rules were implemented because no substantive change to the rules occurred at that time. The rules were therefore implemented prior to October 6, 2008." *Id.* at 46.

The majority was correct that the words promulgated and implemented do not have the same meaning. In fact, the Legislature often puts statutes into effect at future dates long past the date of promulgation. For example, Michigan promulgated 2012 PA 158 on June 7, 2012 after the Governor signed it and it was filed with the Secretary of State. However, the legislature did not implement PA 158 on June 7, 2012. Rather the Legislature set an effective date for PA 158 of October 1, 2012. Thus, 2012 PA 158 has a promulgation date of June 7, 2012, and an implementation date of October 1, 2012. The majority did not err in its analysis, and did not conflate promulgation and implementation.

2. *TES Filer II.*

The Court of Appeals issued a published opinion affirming the MPSC in *In re Consumers Energy*, __ Mich App __; __ NW2d __ (2015) (Docket No. 314361, issued May 28, 2015) (slip op pp 4-5), referred to herein as *TES Filer II*. Judge Stephens

wrote for the majority (with Judge Krause). Judge Wilder dissented, citing Judge Whitbeck's dissent in *TES Filer I*. TES Filer made nearly identical arguments in *TES Filer II* as in the case at bar. In addition, in that case, TES Filer argued that the word "implemented" in MCL 460.6a(8) was only meant to modify the words "federal or state environmental laws or regulations." But the Attorney General argued the Legislature meant for the word "implemented" to modify the words "changes in federal or state environmental laws or regulations." Both the Attorney General and TES Filer argued that "the statute is not ambiguous because the last antecedent rule supports their opposing interpretations of the statute." *Id.* (slip op at 4.)

> Judge Stephens explained the last antecedent rule:
>
> > This rule of statutory construction "provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Stanton v. Battle Creek,* 466 Mich 611, 616; 647 NW2d 508 (2002). In *Hardaway v. Wayne* Co, 494 Mich 423, 429; 835 NW2d 336 (2013), the Court held that "the last antecedent rule does not mandate a construction based on the shortest antecedent that is grammatically feasible," quoting 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 47.33, pp 487–489 for the proposition that "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is 'the last *word, phrase, or clause* that can be made an antecedent *without impairing the meaning of the sentence.*'" (Emphasis added in *Hardaway*). [*Id.*]

Judge Stephens noted that while the last antecedent word or phrase before "that are implemented" is "federal or state environmental laws or regulations," TES Filer's construction would render the words "changes in" mere surplusage. *Id.* slip op at 5. The majority ultimately determined, "Since the last antecedent rule does

not require a look at the shortest antecedent, and the antecedent that makes sense of all the terms is "changes in federal or state environmental laws or regulations," the phrase "that are implemented" should be viewed as referring to "changes in federal or state environmental laws or regulations." *Id.*

This of course still left open the question of whether the "changes" implemented are those required by the law or regulation, or whether they are the changes to the law or regulation. On this point Judge Stephens adopted the sound reasoning of the Court in *TES Filer I*, holding that the 2007 Rules were implemented on their effective date in 2007. *Id.* slip op at 5. Judge Stephens explained:

> [A]s a matter of state regulations, the 2007 rules required CAIR NOx allowances for 2009. As stated above, the state regulations became effective on June 25, 2007 immediately upon filing with the Secretary of State. While CAIR NOx allowances and CAIR NOx Ozone Season allowances refer to allowances issued under a federally-approved SIP, this would mean that the 2007 rules required these allowances at the point that the EPA approved the state SIP. The requirement existed in 2007 but did not mature into an obligation until there was EPA approval. Since the allowances were required by the 2007 state regulations, the costs of the allowances were incurred due to 2007 changes in state environmental regulations, and the changes in the regulations were implemented in 2007, before the October 6, 2008 effective date of subsection (8). Accordingly, TES Filer was not entitled to recoup these costs. [*Id.* slip op at 6.]

The Court of Appeals correctly decided both *TES Filer I* and *TES Filer II*. Not only were their conclusions about when the MDEQ implemented the 2007 Rules correct, they also comported with the intent of the Legislature in Act 286.

D. Michigan should have an objective rule for implementation-date determinations, one that applies to all citizens and entities.

The Court of Appeals decisions in *TES Filer I* and *TES Filer II* both support a single implementation date for statutory and regulatory schemes that is applicable to all Michigan citizens and entities. This Court could affirm the Court of Appeals. When referring to laws and regulations, the word "implemented" as used in MCL 460.6a(8) refers to the effective date of the law or rule. This answer provides an objective standard for the meaning of "implement."

This rule also makes sense in Michigan, where legislators and regulatory agencies may specify the effective date of any new law or regulation, such that implementation is not synonymous with promulgation, even though these two things may often occur at the same time.

Such a holding by this Court would bring certainty to other areas as well. For example, the MDEQ's Michigan Mercury Rule, R 336.2503 *et seq.*, imposes obligations on different entities on different dates. The MDEQ promulgated the Michigan Mercury Rule in 2013. R 336.2502a provides:

> The following rules shall be of no force or effect as to affected EGUs for which the federal MATS is an applicable requirement relative to emissions of mercury… If the federal MATS ceases to be an applicable requirement…[the Michigan Mercury Rule] shall be in force and effect beginning with the third calendar month following the termination of the federal MATS as an applicable requirement or April 16, 2015, whichever is later. [MDEQ R 336.2502a(1)-(2).]

As this Court is no doubt aware, the US Supreme Court struck down the federal MATS on June 29, 2015. *Michigan v EPA*, __ S Ct ___ (2015) (Docket No.

14-46, 2015 issued June 29, 2015), slip op at 12. So, when will the MDEQ implement the Michigan Mercury Rule? When it becomes effective on September 29, 2015. This answer is objective and certain.

In contrast, TES Filer's answer to the above question would not be the same for all Michigan entities. Rather, under TES Filer's interpretation, the MDEQ would presumably implement the Michigan Mercury Rule for most Michigan entities on September 29, 2015. But, the MDEQ would not implement the Michigan Mercury Rule as to the Lansing Board of Water and Light (LBWL) in 2015, as the LBWL does not have to comply with the full requirements until 2018. R 336.2504(2). And even if the federal MATS is no longer an applicable requirement, if the LBWL received a compliance extension from the EPA, then the Michigan Mercury Rule will not impose any requirements upon LBWL until the end date of the originally granted EPA MATS compliance extension. R 336.2504(2)(f). Similarly, the Michigan Mercury Rule does not apply to owners and operators of the City of Marquette, Shiras unit 3, and the Michigan South Central Power Agency, Endicott unit 1, until the original expiration date of a federal MATS compliance extension, regardless whether MATS is still in effect. According to TES Filer's logic, the MDEQ will implement the Michigan Mercury Rule as to LBWL, the City of Marquette, and the Michigan South Central Power Agency on some future unknown date different from when the MDEQ implements the Michigan Mercury Rule for other Michigan entities. The law does not provide for such uncertainty. Whether a

rule is implemented does not depend on who is asking the question. The answer is the same for everyone.

Another example comes from the School Aid Act, which imposes mandatory minimum numbers of days of pupil instruction on Michigan schools as a prerequisite to eligibility for state aid. MCL 388.1701(3)(a)-(b). Except the mandatory minimums do not apply to schools with collective bargaining agreements that provide for less pupil instruction days until after said agreements expire. MCL 338.1701(3)(a)(*i*)-(b), (e). The MPSC argues Michigan implemented the School Aid Act on the effective date of the Act. But, according to TES Filer's logic, Michigan does not implement the State Aid Act at all until the first school year when a school must actually comply with the Act, and this is not the same date for all schools. Determining the date of implementation for any particular school would require an examination of the school's collective bargaining agreements.

This Court should reject TES Filer's approach, which would needlessly complicate determination of implementation dates in Michigan. The examples cited above are just two of many state laws and regulations that apply to different citizens or entities as of different dates. The right answer is the simple rule: Michigan and its agencies implement statutes and regulations on their effective dates.

Alternatively, if this Court rejects the conclusion implementation refers to the effective date, this Court should find that a statute or regulation is implemented when it has a practical effect on anyone. This understanding would still achieve a

single, workable implementation date for statutory and regulatory schemes that is applicable to all Michigan citizens and entities.

Under this view, the Court could interpret the word implement, in the context of laws and regulations, to refer (as TES Filer advocates) to the date upon which the law or regulation has practical effect. However, this Court should not go the extra step TES Filer urges, which would determine implementation dates on a citizen-by-citizen basis, depending on when a particular citizen or entity might feel the practical effect of the law or regulation. This goes too far because it needlessly injects uncertainty into the legislative scheme.

The question of when Michigan implements a law or regulation should only have one answer, and it should apply to everyone in Michigan. Furthermore, Michiganders should be able to determine when laws and regulations are implemented by reading them; they should not have to consult extraneous sources to determine when the State implemented a law.

CONCLUSION AND RELIEF REQUESTED

MCL 460.6a(8) allows biomass plants recovery of costs incurred due to changes in federal or state environmental laws or regulations implemented after the effective date of the act, or October 6, 2008. Michigan regulations implemented in 2007 required biomass plants to purchase NOx emissions allowances during the 2009 NOx season, which TES did in November and December of 2009. The Michigan Public Service Commission acted lawfully and reasonably in declining to allow TES recovery of an additional $636,073 in recovery from Consumers Energy

since TES did not incur the costs due to changes in environmental regulations implemented after October 6, 2008.

The MPSC believes the Court of Appeals got it right in *TES Filer I* and *TES Filer II*, and the simplest and most workable interpretation should prevail: Michigan implements its laws and regulations on their effective dates. However, if this Court disagrees with the Court of Appeals' interpretation, the MPSC urges this Court to hold that Michigan implements its laws and regulations as to all Michiganders when they first have practical effect.

Therefore, for the reasons set forth in this Supplemental Brief and in its Answer in Opposition, Appellee the Michigan Public Service Commission respectfully requests that this Court deny TES Filer's Application for Leave to Appeal.

Respectfully submitted,

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